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April 26, 2022

Via ECF

The Honorable Robert W. Lehrburger
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Re: *Therabody, Inc. v. Tzumi Electronics LLC, et al.*
Civil Action No. 1:21-cv-07803-PGG

Dear Judge Lehrburger:

This firm represents defendant Tzumi Electronics LLC (“Tzumi”) in the above referenced litigation, which is scheduled for a Case Management Conference on Thursday, April 28, at 3:30 p.m. We write to update the Court on a recent development pertaining to Tzumi’s pending request that the issues of damages and willfulness be bifurcated from liability in this case involving fourteen patents.

Last Thursday, subsequent to the parties’ case management submission and prior to the Court’s ruling on Tzumi’s pending bifurcation request, plaintiff Therabody, Inc. (“Therabody”) served the enclosed notice, which attaches a subpoena to Tzumi’s customer, Walmart (the “Subpoena”). As evident from even a cursory review of the Subpoena, it is entirely directed to damages, and much of the information sought is duplicative of discovery requests already pending against Tzumi.¹

Since Tzumi made plain to Therabody that it would not remove its non-infringing products from the market (*see* Tzumi’s pending motion for leave to file partial summary judgment, ECF No. 38), Therabody has embarked on a campaign to exert pressure on Tzumi to settle by harassing

¹ The Subpoena is also overbroad and burdensome and does not remotely comply with the requirements of the Federal Rules. *See* Fed. R. Civ. P. 45 (d) (“Avoiding Undue Burden and Expense; Sanctions”).

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The Honorable Robert W. Lehrburger
April 26, 2022
Page 2

Tzumi and its customers. This outrageous 18-topic, 9-page subpoena is only the latest episode in that regard. Therabody recently sued another customer of Tzumi, TJX, in Delaware, asserting infringement of identical patents and products. *See Therabody, Inc. v. The TJX Companies, Inc.*, Case No. 22-cv-310 (D. Del.). Thus, shortly after Tzumi refused to bow to Therabody's baseless infringement allegations, Therabody created two separate, co-pending litigations, in two different district courts, addressing the exact same fourteen patents, accusing the exact same products of infringement, and forcing judges in different districts to simultaneously address the exact same issues on all fourteen patents.

Therabody's conduct after their failed settlement efforts smacks of bad faith. The issue of damages should be bifurcated for the many reasons outlined in Tzumi's portion of the proposed Civil Case Management Plan and Scheduling Order (ECF No. 41), but bifurcation will have the added benefit of curtailing Therabody's intentional harassment of third parties. We respectfully urge the court to bifurcate damages, and permit Tzumi to file a short summary judgment motion that Tzumi expects will end this case.

Respectfully submitted,

/s/ Scott D. Stimpson
Scott D. Stimpson

Enclosure

cc: All counsel of record

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 THERABODY, INC., a Delaware corporation,

4 Plaintiff,

5 v.

6 TZUMI ELECTRONICS LLC, a New York
7 company, TZUMI INC., a New York
8 corporation, and DOES 1 through 10,
9 inclusive,,
10 Defendants.

1:21-cv-07803 (PGG)

NOTICE OF SUBPOENA

11 To: Katherine M. Lieb, Scott D. Stimpson, and Steven Z. Luksenberg
12 SILLS CUMMIS & GROSS, P.C.
13 101 Park Avenue, 28th Floor
14 New York, NY 10178
15 Telephone: (212) 643-7000
16 Facsimile: (212) 643-6500
17 Email: klieb@sillscummis.com

18 sstimpson@sillscummis.com
19 sluksenberg@sillscummis.com

20 PLEASE TAKE NOTICE, pursuant to Federal Rule of Civil Procedure 45, that Plaintiff
21 Therabody, Inc. intends to serve a Subpoena, in the form attached hereto, on Walmart Inc. on
22 April 21, 2022 or as soon thereafter as service may be effectuated.
23

24 Respectfully submitted,

25 /s/ Gregory S. Cordrey

26 Gregory S. Cordrey
27 Jeffer Mangels Butler & Mitchell LLP
28 3 Park Plaza, Suite 1100
Irvine, CA 92614
gcordrey@jmbm.com
(949) 623-7200

Jeffer Mangels
Butler & Mitchell LLP
JMBM

UNITED STATES DISTRICT COURT

for the

Southern District of New York



THERABODY, INC., a Delaware corporation

*Plaintiff*v.
TZUMI ELECTRONICS LLC, a New York company,
TZUMI INC., a New York Corporation, and DOES
1-10*Defendant*

Civil Action No. 1:21-cv-07803 (PGG)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTIONTo: Walmart Inc.
c/o CT Corporation System
124 West Capitol Avenue, Suite 1900, Little Rock, AR 72201*(Name of person to whom this subpoena is directed)*

☒ **Production:** **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: Please see Attachment for documents/records sought.

Place: First Legal Records,
c/o North Winds Investigations, Inc.
581 Chantel Ave.
Springdale, AR 72764; Telephone: (877) 591-9979

Date and Time:

05/11/2022 10:00 am

☐ **Inspection of Premises:** **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:

Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 04/21/2022

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Gregory S. Cordrey

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Therabody, Inc.
Gregory S. Cordrey (gcordrey@jmbm.com), who issues or requests this subpoena, are:
Jeffer Mangels Butler & Mitchell LLP
3 Park Plaza, Suite 1100, Irvine, CA 92614; Telephone: (949) 623-7200

Notice to the person who issues or requests this subpoena

A notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

ATTACHMENT “A”**DEFINITIONS AND INSTRUCTIONS**

1. The terms “WALMART,” “YOU,” and “YOUR” shall mean and refer individually and collectively to Walmart Inc. and, when appropriate in the context of the requests, any of its employees, consultants, agents, directors, officers, principals, representatives, successors, predecessors-in-interest, and/or any other person or entity acting for or on its behalf, including but not limited to its direct or indirect subsidiaries (and their respective employees, consultants, agents, directors, officers, principals and representatives).

2. The terms “TZUMI ELECTRONICS,” and “TZUMI” (collectively, “TZUMI”) shall mean and refer individually and collectively to Defendants Tzumi Electronics LLC and Tzumi, Inc. and, when appropriate in the context of the requests, any of its employees, consultants, agents, directors, officers, principals, representatives, successors, predecessors-in-interest, and/or any other person or entity acting for or on its behalf, including but not limited to its subsidiaries (and employees, consultants, agents, directors, officers, principals and representatives).

3. The term “THERABODY” shall refer to Plaintiff THERABODY, INC. when appropriate in the context of the requests, any of its employees, consultants, agents, directors, officers, principals, representatives, successors, predecessors-in-interest, and/or any other person or entity acting for or on its behalf, including but not limited to its subsidiaries (and employees, consultants, agents, directors, officers, principals and representatives).

4. “ACTION” shall mean the lawsuit filed by PLAINTIFF against DEFENDANT, in the United States District Court, Southern District of New York, Case No. 1:21-cv-07803 (PGG).

5. “COMPLAINT” shall mean the First Amended Complaint filed by PLAINTIFF on or about November 29, 2021 in the ACTION.

6. “ACCUSED PRODUCTS” shall mean the Tzumi FitRx percussive massage device, the Tzumi Profit Elite percussive massage device, the Tzumi Profit mini percussive massage device, the Tzumi FitRx mini percussive massage device, and certain attachments (shown in Appendix A), including any products known by other names having substantially the same design as those shown in Appendix A.

1 7. “RELATING TO” shall mean supporting, refuting, discussing, concerning,
2 constituting, containing, summarizing, memorializing, evidencing or connected to in any way
3 logically or factually with the matter described herein.

4 8. “INCIDENTS” shall mean and refer to the circumstances and events surrounding
5 the acts and/or omissions alleged in the COMPLAINT which give rise to this lawsuit.

6 9. “PERSON” shall mean and refer to the plural as well as the singular, and means
7 any natural person, firm, association, corporation, public entity, or any other form of legal entity or
8 governmental body unless the context indicates otherwise.

9 10. “COMMUNICATION” or “STATEMENT” means any contact or exchange of
10 information whether written, oral, or electronic transmission of information between two or more
11 persons, including any of the directors, officers, employees or representatives of any non-natural
12 person, and shall include, without limitation, (a) written contact by such means as e-mail, instant
13 messages, Teams, Google Hangouts, Slack, letters, memoranda, notes, telegrams, facsimile, telex
14 or any other internal or external forms of communication; (b) oral contact, by such means as face-
15 to-face meetings, seminars, conferences, telephone, Zoom, Teams, FaceTime conversations; (c)
16 electronically, magnetically or digitally stored information by such means as voice mail or e-mail
17 that is or has been transmitted between any two or more persons and (d) advertisements,
18 publications, press releases, commercials, and other promotional and marketing materials.

19 11. “DOCUMENT” or “DOCUMENTS” shall mean all documents, electronically
20 stored information, and tangible things, including without limitation all writings (as defined in
21 § 250 of the California Evidence Code) and all other means of recording information, whether
22 written, transcribed, taped, filmed, microfilmed, or in any other way produced, reproduced, or
23 recorded, and including but not limited to: originals, drafts, computer-sorted and computer-
24 retrievable information, copies and duplicates that are marked with any notation or annotation or
25 otherwise differ in any way from the original, correspondence, memoranda, reports, notes,
26 minutes, contracts, agreements, books, records, checks, vouchers, invoices, purchase orders,
27 ledgers, diaries, logs, calendars, computer printouts, computer disks, card files, lists of persons
28 attending meetings or conferences, sketches, diagrams, calculations, evaluations, analyses,

1 directions, work papers, press clippings, sworn or unsworn statements, requisitions, manuals or
2 guidelines, audit work papers, financial analyses, tables of organizations, charts, graphs, indices,
3 advertisements and promotional materials, audited and unaudited financial statements, trade
4 letters, trade publications, newspapers and newsletters, photographs, emails, electronic or
5 mechanical records, facsimiles, telegrams and telecopies, and audiotapes. Each draft, annotated,
6 or otherwise non-identical copy is a separate DOCUMENT within the meaning of this term.
7 DOCUMENTS shall also include any removable sticky notes, flags, or other attachments affixed
8 to any of the foregoing, as well as the files, folder tabs, and labels appended to or containing any
9 documents. DOCUMENTS expressly include all COMMUNICATIONS and all ELECTRONIC
10 RECORDS.

11 12. "ELECTRONIC RECORDS" shall mean the original (or identical duplicate when
12 the original is not available) and any non-identical copies (whether non-identical because of notes
13 made on copies or attached comments, annotations, marks, transmission notations, or highlighting
14 of any kind) of writings of every kind and description inscribed by mechanical, facsimile,
15 electronic, magnetic, digital, or other means. ELECTRONIC RECORDS includes, by way of
16 example and not by limitation, computer programs (whether private, commercial, or work-in-
17 progress), programming notes and instructions, activity listings of email transmittals and receipts,
18 output resulting from the use of any software program (including word processing documents,
19 spreadsheets, database files, charts, graphs and outlines), electronic mail, and any and all
20 miscellaneous files and file fragments, regardless of the media on which they reside and regardless
21 of whether said ELECTRONIC RECORDS exist in an active file, deleted file, or file fragment.
22 ELECTRONIC RECORDS includes without limitation any and all items stored on computer
23 memories, hard disks, diskettes and cartridges, network drives, network memory storage, archived
24 tapes and cartridges, backup tapes, floppy disks, CD-ROMs, removable media, magnetic tapes of
25 all types, microfiche, and any other media used for digital data storage or transmittal.
26 ELECTRONIC RECORDS also includes the file, folder tabs, and containers and labels appended
27 to or associated with each original and non-identical copy.

28 13. "IDENTIFY" means to state in full and complete detail. When used in reference to

1 a DOCUMENT, "IDENTIFY" means to state with the specificity required of a subpoena for the
2 production of documentary evidence the date, author, description, address, nature, custodian, and
3 location of the DOCUMENT referred to by the interrogatory, as well as the substance of the
4 DOCUMENT.

5 14. Unless otherwise stated herein, these Requests cover Worldwide sales and the
6 period from January 1, 2019 to the present.

7 **REQUEST FOR PRODUCTION**

8 1. DOCUMENTS sufficient to show the total gross and net revenues for each of the
9 ACCUSED PRODUCTS by region or geographic location (*e.g.*, city, state and/or country).

10 2. DOCUMENTS sufficient to show the retail sales price for each of the ACCUSED
11 PRODUCTS.

12 3. DOCUMENTS sufficient to show the price paid by WALMART for each of the
13 ACCUSED PRODUCTS.

14 4. DOCUMENTS sufficient to show the total quantity of units sold by WALMART
15 for each of the ACCUSED PRODUCTS by region or geographic location (*e.g.*, city, state and/or
16 country).

17 5. DOCUMENTS sufficient to show the total quantity of units in inventory for each
18 of the ACCUSED PRODUCTS.

19 6. DOCUMENTS sufficient to show the total quantity of units shipped by
20 WALMART for each of the ACCUSED PRODUCTS.

21 7. DOCUMENTS sufficient to show YOUR costs associated or attributed to the
22 ACCUSED PRODUCTS, including the purchase price, direct labor costs, indirect labor costs,
23 advertising and promotional costs, and any other overhead costs attributed to the ACCUSED
24 PRODUCTS.

25 8. DOCUMENTS sufficient to show gross profits, net profits, and profit margins for
26 each of the ACCUSED PRODUCTS.

27 9. DOCUMENTS sufficient to show invoices for each of the ACCUSED
28 PRODUCTS.

1 10. DOCUMENTS sufficient to show sales, marketing, advertising, promotional, and
2 public relations materials concerning each ACCUSED PRODUCT, including user manuals.

3 11. All agreements, including but not limited to written, oral and any other types of
4 agreements, between and/or among TZUMI and WALMART regarding the ACCUSED
5 PRODUCTS.

6 12. All COMMUNICATIONS, including ELECTRONIC RECORDS, including but
7 not limited to written, oral and any other types of COMMUNICATION, between and/or among
8 TZUMI and WALMART regarding the ACCUSED PRODUCTS.

9 13. All DOCUMENTS, including COMMUNICATIONS, referring to Therabody,
10 including references to Theragun, any products made by Therabody, Therabody's patents,
11 including specific patents or references generally to Therabody's patents, Therabody's trade dress,
12 Therabody's trademarks, or any other references to Therabody.

13 14. All DOCUMENTS constituting patent licenses, cross licenses, or other agreements
14 providing any rights in any patents related to percussive massage devices or attachments and
15 accessories used with percussive massage devices.

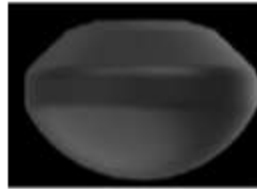
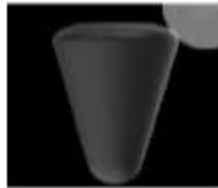
16 15. All DOCUMENTS, including COMMUNICATIONS, referring to any
17 communications with THERABODY.

18 16. DOCUMENTS sufficient to show other massage devices offered for sale and sold
19 by WALMART since January 2019.

20 17. All COMMUNICATIONS, including ELECTRONIC RECORDS, including but
21 not limited to written, oral and any other types of COMMUNICATION regarding the use of a
22 triangle design or reference to an ergonomic handle for a massage device.

23 18. All COMMUNICATIONS, including ELECTRONIC RECORDS, including but
24 not limited to written, oral and any other types of COMMUNICATION regarding any massage
25 device that WALMART considered retailing.

APPENDIX A



PROOF OF SERVICE

Therabody, Inc. v. Tzumi Electronics LLC, et al.
Civil Case No. 1:21-cv-07803 (PGG)

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is 3 Park Plaza, Suite 1100, Irvine, CA 92614-2592.

On April 21, 2022, I served true copies of the following document(s) described as **NOTICE OF SUBPOENA** as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Jeffer Mangels Butler & Mitchell LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Irvine, California.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address Hhauck@jmbm.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on April 21, 2022, at Irvine, California.



Heather Hauck

SERVICE LIST

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